

IN THE NATIONAL COMPANY LAW TRIBUNAL

HYDERABAD BENCH, AT HYDERABAD

C.P.(IB) NO. 97/7/HDB/2017

In the Matter of :

Between:

QUINN LOGISTICS INDIA PRIVATE LIMITED

Having its registered office at:

2nd Floor, SVSKL Mansion,

H.No.3-6-369/A/18,

Street No.1, Himayat Nagar,

Hyderabad – 500 029.

... Applicant / Financial Creditor

Versus

MACK SOFT TECH PVT. LTD.,

Having its Registered Office at:

Q-City, 6th Floor, Block-A,

Sy.No.109, 110 & 111/2,

Nanakramguda Village,

Serilingampally Mandal,

Hyderabad, Telangana -500 032

.... Respondent / Corporate Debtor

.... Judgment Delivered on: { / } .08.2017

CORAM:

Hon'ble Mr. Rajeswara Rao Vittalana, Member (Judicial)

Hon'ble Mr. Ravikumar Duraisamy, Member (Technical)

Parties Present:

Counsels for the Petitioner:

Mr. Rajiv Nayyar, Ld. Sr.Advocate

Mr. Jayanth Mehta

Mr. Swapnil Gupta

Ms. Shivambika Sinha

Mr. M. Ramu

Mr. Rambabu

Mr. Robert Dix,

Director of Petitioner

Counsels for the Respondent:

Mr. Dammalapati Srinivas,
Ld.Sr.Advocate

Mr. U.K.Choudhary, Sr.Advocate

Ms. Ranjana Roy Gawai,

Mr. Pervinder

Mr. ChallaGunaranjan

Mr. Rajeev K Pandey

Mr. M.Sridhar



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Per: Ravikumar Duraisamy, Member (Technical)

JUDGEMENT

Brief Facts:

1. The Financial Creditor has filed this present Petition under Section 7 of IBC for initiating Corporate Insolvency Resolution Process against Mack Soft Tech Pvt. Ltd. The case was first listed on 07-07-2017 and both the Counsels appeared. Learned Counsel for the Respondent requesting time to file, their objections/reply if any well before the next date of hearing and Counsel for the Respondent should also submit his Vakalat and the case is posted 12-09-2017. On 11-07-2017 heard both the Counsels. The Learned Counsel for the Respondent filed objection to the Petition and Learned Counsel for the Petitioner requested time to file a Rejoinder and the case was posted on 21-07-2017. The case was heard at length from both the parties on 21-07-2017 and the Learned Counsel for the Respondent requested time to produce legal opinion obtained in this case and the case is posted on 01-08-2017. On 01-08-2017 heard both the sides and parties were directed to submit their written submission within a week and orders reserved.



Submissions of the Petitioner / Financial Creditor:

2. The Company Petition (IB) No.97/7/HDB/2017 has been filed by the Financial Creditor viz Quinn Logistics India Private Limited (Petitioner/Financial Creditor), against Mack Soft Tech Private Limited (Respondent/Corporate Debtor), under Section 7 of Insolvency and Bankruptcy Code 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, inter alia seeking the following prayers:

- a) For admission of the present petition and to initiate Corporate Insolvency Resolution Process in respect of the Corporate Debtor under the Insolvency and Bankruptcy Code 2016;
- b) To Appoint Mr. Sundaresh Bhat having Registration No.IBBI/IPA-001/IOP-P00077/2017-18-10162, as the Insolvency Resolution Professional (IRP) in respect of the Corporate Debtor under Section 16 of the IBC 2016; and
- c) To Declare a moratorium in respect of all actions set forth in Section 14 of the Insolvency and Bankruptcy Code, 2016 etc

3. Quinn Logistics India Private Limited, the Financial Creditor, advanced an Inter-Corporate Loan to Mack Soft Tech Private Limited, the Corporate Debtor, which has defaulted in repayment of the outstanding loan amount.

4. The Corporate Debtor Company is engaged in the business of leasing out an office complex in Hyderabad named as "Q-City" located at Sy.No.109,110&111/2, Nanakramguda Village, Serilingampally Mandal, Hyderabad, Telangana-500032 and having total rentable area of approximately 8 lakh sq.ft (Q-City).

5. The construction of Q-city was undertaken by "Indu Projects Limited" for the Corporate Debtor. The cost of construction has been financed by the Corporate Debtor through inter-alia Inter-Corporate Loan given by the Financial Creditor.

6. The Inter-Corporate Loan was disbursed by way of payments made for, and on behalf of, the Corporate Debtor, inter alia towards the construction cost of Q-City and other liabilities of the Corporate Debtor. The disbursements were made between October 2007 to July 2010 from time to time and are acknowledged in the Balance Sheet of the Corporate Debtor. After repayment/adjustment of various



accounts, a total amount of Rs.62,90,45,905/- (Rupees Sixty Two Crores Ninety Lakhs Forty Five Thousand Nine Hundred and Five only) is outstanding, as acknowledged in the Balance Sheets of the Corporate Debtor for the years ending 31.3.2012, 31.03.2013, 31-03-2015 and 31.03.2016. Balance sheet for 31-03-2014 was not filed by the Corporate Debtor.

7. As per the records of the Financial Creditor there is no written agreement between the Financial Creditor and the Corporate Debtor. At the time of disbursement of the loan in October 2007 and till 21.06.2011, the Financial Creditor was the holding company of the Corporate Debtor (held 99.9% of shareholding of the Corporate Debtor). The shareholding of the Financial Creditor has been diluted by issue of 3,76,301 shares to MECON FZE on 22-06-2011 for consideration of only Rs.40,71,579/-.
8. However the 9,990 shares held by the Financial Creditor have been transferred to UCA LOGVAS AG on 27-08-2011 for a consideration only Rs.9,90,000/-. The share issue and share transfer are subject matter of the Civil Suits in O.S.No.21 of 2012 and O.S. No.1303 of 2013 pending before the Learned District Judge, Ranga Reddy Court, Hyderabad.
9. On 15.06.2017, the Financial Creditor issued notice of demand on the Corporate Debtor recalling the loan and calling upon the Corporate Debtor to make repayment thereof immediately and no later than 30.06.2017.
10. The Corporate Debtor, despite receipt of the notice dated 15.06.2017, has not repaid the admitted outstanding loan amount due to the Financial Creditor. Instead, vide reply dated 29.6.2017, the Corporate Debtor has stated that it will have to verify the claims made by the



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Financial Creditor from its records and has sought two-three weeks' time for the same. The reply of the Corporate Debtor is vague and an attempt to delay the repayment of the Financial Debt which is admitted in its Balance Sheet.

11. The Financial Creditor has not initiated any proceedings for the recovery of the outstanding loan amount of Rs.62,90,45,905/- (Rupees Sixty Two Crores Ninety Lakhs Forty Five Thousand Nine Hundred and Five only).
12. The Corporate Debtor has committed a default in repayment of the Financial Debt of Rs.62,90,45,905/- (Rupees Sixty Two Crores Ninety Lakhs Forty Five Thousand Nine Hundred and Five only) to the Financial Creditor and hence the present petition.
13. Hon'ble Supreme Court decided in Civil 6715/2014 on 5-11-2016 between Mr.Saleem Akbar Ali Nanji v/s Union of India & Others. The gist of matter is that bank writing off of Rs.120 crores and appropriating the said amount from the general reserves fund.
14. The Corporate Debtor also contended that there is no Financial debt as per section 5(8) of the IBC code i.e. disbursed against the consideration for the time value of money.
15. The Corporate Debtor had relied upon the following judgements:

1. Judgement of Hon'ble NCLT dt.-07-17 in the matter of Nikhil Mehta & Sons V/s AMR Infrastructure Ltd.
2. The High Court of Andhra Pradesh at Hyderabad in O.S.A.No.40 of 98 decided on 3-3-99 between Vijayalakshmi V/s Hari Hara Ginning and Pressing, Nandigaon.

Company – Winding up petition – Sections 433(3), 433(f) and 439 of Companies Act 1956 and Section 18 of Limitation act, 1963 – Appellant filled winding up petition of Respondent Company – Single Judge passed Order for declining winding up petition – appeal filed – civil suit filed for recovery of debt of appellant – defense given by Respondent is not frivolous – question of limitation is of fact to be determined in regular suit – held, winding up petition cannot be admitted.



16. Mr. Sundaresh Bhat having Registration No. IBBI/IPA-001/IP-P00077/2017, 18-10162 as an Interim Resolution Professional that the certificate is valid from 2-05-2017. Vide Form-II dated 29-05-2017, submitted to NCLT Hyderabad Bench has confirmed that he is currently qualified as IRP, not currently serving as an IRP / RP / Liquidator in any Company. No disciplinary proceedings against him with the Board and eligible to be appointed as IRP in respect of the Corporate Debtor

17. Submissions/ Objections of the Respondent / Corporate Debtor:

The Corporate Debtor submitted that the Petitioner has no locus to file the above petition and contended various preliminary submissions and objections.

I. The Petitioner does not exist as a Company and or as a Legal Entity. Name of the Petitioner has been struck off



- a. That the Respondent Company has checked up with the website of the MCA (www.mca.gov.in) and it has revealed that the name of the Applicant / Petitioner Company has already been struck off by Registrar of the Companies. In fact a public notice was issued by the Ministry of Corporate Affairs on 05.05.2017 giving 30 days notice prior to striking off and which notice period ended on 05.06.2017.
- b. That the effect of the strike off of the name of the Applicant / Petitioner Company is that it ceases to be a legal entity recognized by law and the certificate of incorporation issues, it is deemed to have been cancelled. The authorized signatory/director of the Applicant/Petitioner Company does not have any authority to present and / or to continue proceeding with the above Application/Petition.

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- c. That therefore, the Applicant / Petitioner could not have presented the above Application / Petition and now the Applicant / Petition cannot further proceed with the above Applicant / Petition.
- d. Therefore, the above Applicant / Petition deserves to be dismissed.
- e. A copy of the print out of master data of the petitioner from the MCA web site and a copy of the public notice dated 05.05.2017 issued by MCA were submitted.

II. The Petitioner is not a Financial Creditor as defined under section 5(7) of the IBC Code.

That the very provisions of Section 7 of the IBC Code are available to Financial Creditor alone and no one else. From the reading of the above Application/Petition, it is very clear that the Applicant/Petitioner is not Financial Creditor. In fact, it is the case of the Applicant/Petitioner as borne out from the Synopsis filed by the Applicant/Petitioner that the Applicant/Petitioner made certain payments to the Indu Projects Limited and for other liabilities on behalf of the Respondent Company in the years 2007 to 2010, since the Applicant/Petitioner was a holding company of the Respondent Company at that time. By any stretch of imagination, a holding Company paying off liabilities of its subsidiary company cannot be considered as a Financial Creditor under the provisions of the IBC Code as the purported payment is not a debt disbursed against the consideration of time value of money. Therefore, the Applicant/Petitioner is not a Financial Creditor.



III. There is no Financial Debt in terms of the Section 5(8) of the IBC Code.

- a. The Respondent relied upon sub section 7 & 8 of Section 5 of the IBC Code. The respondent further submitted that the petitioner company was not legally capable to grant the loan to any person or the company whatsoever as per financial collaboration approval issued by the Government of India dated 09-04-2007.
- b. That the fact that there is no "Financial Debt" due and payable by the Respondent to the Petitioner, is further evident from the Balance Sheet of the Petitioner for 31st December 2009 which clearly mentions that the amount reflecting against the Respondent Company is not a loan against the Respondent Company but is merely an "Intercompany Balances". A copy of the Balance Sheet of the Petitioner for 31st December 2009 was also submitted.
- c. The Petitioner has clearly concealed this material document i.e. its own balance sheets for the Financial Year 2007-08 and 2008-09 from this Hon'ble Tribunal, while it has filed various balance sheets of the Respondent company. It is pertinent to mention here that the question of looking at the balance sheets of the Respondent Company only arise if the Petitioner is able to demonstrate ex-facie that It is a Financial Creditor of the Respondent Company. The above Petition deserves to be dismissed on grounds of concealment alone.
- d. That the reliance by the Petitioner on the balance sheet of the Respondent Company for claiming the purported Loan is highly erroneous, the Respondent Company has already Written Off the purported debt from the books of the Respondent Company in the Financial Year 2016-2017.
- e. Mere reflection of an amount as an unsecured loan in balance sheet of the Respondent Company does not cover the case of the petitioner within (4) four corners of IBC Code.



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- f. In the Board Meeting held on 23-03-2016 the unsecured loans in the books of accounts of the company amounting to Rs.62,94,18,214/- which are shown and reflected in the books of accounts of the company as an amount due and payable in the books of accounts and has not been claimed as unsecured loan by any company or person with reference to the company may be first discussed in the Accounts Department of the Company and the board further resolved that Mr. Anil Kumar, CFO of the company asked to closely examine the whole issue and what treatment may be given to this amount and whether it will be appropriate to write off the amount in the Financial year ending 31-03-2017 keeping in view the revenue and profitability of the company etc.
- g. The Corporate Debtor submitted that the claim of Financial Creditor is time barred and therefore, they are not eligible to file the Company Petition under Section 7 of the IBC. In support of the claim they also submitted a legal opinion obtained from Senior Advocate and accordingly the outstanding amount of Rs.62,90,45,905/- of the Financial Creditor was written off in the books of account of the Corporate Debtor and they have considered the same amount as income of the Corporate Debtor and also paid Income Tax towards the same. Subsequently they also relied upon Indian Accounting Standard 109, Chapter III Recognition & Derecognition. In the same chapter clause 3.3 deals with the derecognition of Financial liabilities, further they relied upon clause 3.3.1. of the same accounting standard for claiming that the aforesaid outstanding amount can be written off and the same is reproduced "An entity shall remove a Financial liability (OR a part of a Financial liability) from its balance sheet when, and only when, It is extinguished - i.e. when the obligation specified in the contract is discharge or cancel or expires".



IV. There is no default of any purported debt as needed for the application of Section 7 of the IBC Code.

- a. That the above Petition is further incomplete as required in terms of Section 7(5) (a) & (b) of the Insolvency and Bankruptcy Code (IBC), 2016 since the amount of default and date due is not specifically stated in the balance sheet of the company which is the only evidence relied upon by the Petitioner for his Petition.
- b. That it is pertinent to mention here that the above application is also incomplete and not maintainable since the amount of debt and the amount of defaults are treated as same which is contrary to the requirements of Section 7 of Insolvency and Bankruptcy Code (IBC), 2016
- c. As per the audit report of the Corporate Debtor there is no repayment schedule for the unsecured loans taken by the respondent company. The Corporate Debtor further submitted that even if it assume that a loan to be paid by the Corporate Debtor, the said loan cannot be recalled unilaterally by any director of a company by sending a letter without any board resolution recalling the purported loan.
- d. The Corporate Debtor vide its subsequent letter 06-07-2017 replied to Financial Creditor that on verification of our records, we have not found any such amount due and payable by our company to so called Financial Creditor Quinn Logistics India Pvt. Ltd. or any other company or any person. We therefore, state that, no amount at all is due and payable to your company as claimed by you. Your claim is wrong and denied in toto.



- V. The Petition is incomplete in terms of the Section 7(2) of the IBC Code and is liable to be rejected in terms of the Section 7(5) (B) of the IBC Code

That the Application of the Petitioner is incomplete since the documents annexed in support of the amount of the debt and the default due, do not reflect the existence of the amount of debt or the amount of default of the date of filing the application etc.

- VI. The Petitioner is guilty of concealment.

- a. That the Petitioner is guilty of concealment and approaching this Hon'ble Tribunal with unclean hands. Particularly because the Petitioner has not filed even a single balance sheet of the Petitioner Company since the same discloses that the purported disbursed loan is nothing but merely an "Intercompany Balances" reflected in the books of the Petitioner and the same by any stretch of imagination cannot be considered as a debt or a claim in terms of the IBC Code.
- b. In the above background, the Corporate Debtor submitted that it is clear neither the Applicant nor Petitioner is a Financial Creditor nor the claim of the Applicant/Petitioner is a Financial Debtor. Therefore, the above application/petition of the Applicant/Petitioner deserves to be dismissed on this ground alone.
- c. That in view of the above mentioned contentions, preliminary submissions and objections the above application/petition under the IBC code is incomplete and not maintainable, therefore, the above Application/Petition deserves to be rejected with exemplary costs.



The above contentions of the Respondent are discussed in brief in following paragraphs.

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18. The Chief Financial Officer of Corporate Debtor has confirmed that he is not found any corresponding entry of receipt of the loan in the Petitioner's company whose name was recorded in the books of accounts, whereas the Board Resolution dated 20-06-2016 clearly recorded that an amount of Rs.62,90,45,905/- is shown and reflected in the books of accounts of the company as an amount due and payable in the name of the two companies namely Quinn Logistics India Pvt. Ltd. and Quin Properties India Pvt. Ltd. respectively.

19. The Respondent Company obtained an expert legal opinion dated 22-11-2016 from a Senior Advocate and the same was placed before Board of the Corporate Debtor. As per the said legal opinion, the Respondent Company could legally and validly write off the entire unsecured loan entry from the books of accounts of the company in the Financial Year ending 31-03-2017.



20. The Board of the Respondent Company accepted the report of the legal expert and finally decided to write off the entries in the Board Meeting held on 28-12-2016.

21. From the reply of the Corporate Debtor, the Board Meeting was held on 28-12-2016 wherein it was resolved to write off an amount of Rs.62,94,18,214/- with immediate effect and hence there will be no such sum payable to any person or company and the same may be considered as deemed income in the hands of the company for the Financial Year 31-03-2017.

22. The Respondents also relied upon the following judgements of Hon'ble NCLAT & Hon'ble Supreme Court:

1. Definition of Financial Creditor and Financial debt as upheld by NCLAT in para 17 in Nikhil Mehta & Sons Vs AMR Infra Ltd in Company Appeal No.07/2017.
2. Starlog Enterprises Ltd Vs ICICI Bank Ltd, NCLAT in Company Appeal No.05/2017, dated 24-05-2017 para 20 & 21.

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3. CIT Vs Chip Soft Technology Pvt. Ltd. before the Hon'ble High Court of Delhi decided on 20-07-2012 para 9.
4. Innoventive Industries Ltd. Vs. ICICI Bank & Another, Company Appeal No.1&2 of 2017 para 82, 83 & 85 decided on 15-05-2017.

23. The Corporate Debtor also raised the issue that the Director who was authorized to initiate Corporate Insolvency against the Corporate Debtor is also legally not eligible that admittedly the Petitioner Company has not filed its Annual Returns to the Registrar of the Companies for more than three consecutive Financial Years. Admittedly the Directors of the Petitioner Company are in default. The Directors of the Petitioner Company therefore, are disqualified to be Directors of the Petitioner Company. Therefore, under Section 167 of the Act, it is very clear that there is automatic vacation of Office of the Director on disqualification incurred under Section 164.

24. Further Written Submissions:

The contents of para 1 to 5 of the reply are wrong and denied.

- i) With regard to point one of the Corporate Debtor submissions i.e. the Petitioner does not exist as a Company and or as a legal entity, the Financial Creditor submitted that the above contention is simply incorrect, since striking off the name of the Company is not notified in the official Gazette of India as per section 248(5) of the Companies Act 2013 and striking off resolution of a company is only effective if there is a publication in the official gazette of striking of a company. The Financial Creditor further submitted that the screen sought to be relied on by the Respondent relates to the status of e-filing and the mere screen sought has no effect, impact or value in law.



- ii) The Petitioner Company approached the Hon'ble High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh and obtained stay order dt.12-07-2017. The Hon'ble High Court has been pleased to pass the direction against the ROC in W.P.No.22997 of 2017, not to proceed with a Gazette Publication under Section 248(5) of the Companies Act 2013 in relation to the Applicant i.e. Quinn Logistics India Pvt. Ltd. It is therefore, clear that the Respondent's objections that the Applicant does not exist as a legal entity is incorrect and without basis.
- iii) The contents of para 6 of the reply are incorrect and denied. It is submitted that the Respondent is seeking to confuse the issue of disbursement of debt. Respondent does not dispute that the debt was disbursed by the Applicant by way of payments made for and on behalf of the Respondent for the construction of Q-City and other liabilities of the Respondent.
- iv) The Financial Creditor have prayed that It is like loan disbursed by the bank towards the housing loan granted to any individual wherein the bank pays directly to the builder rather than making payment to the borrower. The IBC nowhere provides that the disbursement of loan by a holding company to a subsidiary is excluded from the definition of Financial debt. The petitioner further submitted that in the present case, the applicant is no longer a holding company of the respondent and reiterated that the applicant is a Financial Creditor.
- v) In the present case the amount of Rs.62,90,45,905/- is acknowledged as an Intercompany Loan under the loans in the balance sheet of the respondent company. It is denied that there is any concealment of any material fact as alleged or otherwise. It is denied that the applicant is not a Financial Creditor.



vi) The contents of para 8 are incorrect and denied. The question of applicability of the Foreign Exchange Management Act, 1999 (FEMA) to the transaction of loan between the Applicant and the Respondent does not arise as the Applicant and the Respondent are both companies registered in India and the transaction is in Indian Rupees. The Financial Collaboration Approval relied upon by the Respondent is granted to Quinn Logistics Sweden AB. The loan given by the Applicant to the Respondent does not require any permission from the Government of India. FEMA is only applicable to remittance of funds into or outside India. It is therefore, denied that the Applicant is not legally capable of granting any loan to the Respondent. The loan granted by the Applicant to the Respondent is valid and cannot be avoided.



vii) The petitioner further submitted that the term inter-corporate loan and inter-company balance are one and the same. In fact, it is the balance sheet of the Respondent that amounts to both acknowledgement and submission of the liability of the Respondent. It is denied that there is any concealment of any material fact as alleged or otherwise. It is denied that the Applicant is not a financial creditor.

viii) It is submitted that as on 31.03.2012 the inter-corporate loan amount of Rs.62,90,45,905/- was recoverable from the Respondent and this amount has been continuously acknowledged by the Respondent in each subsequent balance sheet up to 31.03.2016 (being the latest available audited balance sheet), which has been publicly published and

submitted with the RoC. Based on the acknowledgement in the balance sheet, the Applicant continued the loan and did not recall the same till 15 June 2017. The incidence of interest is not a pre-requisite of the definition of Financial Debt under Section 5(8) of the IBC Code. Further, as noted in Reply to para 7 above, the definition of Financial Debt includes within its ambit any transaction that has the commercial effect of borrowing. Clearly the transaction of inter-corporate loan from the Applicant to the Respondent is borrowing and is classified as such in the balance sheets of the Respondent. Moreover, and for the sake of completeness, it may be noted that the Respondent incorrectly understands that time value of money must necessarily be positive, or require payment of interest. However, Section 5(8) of the IBC Code specifically uses the word "interest, if any" and does not in any way exclude an inter-corporate loan repayable without interest.



- ix) The contents of para 12 under Reply are wrong and denied. It is denied that the financial debt as defined under Section 5(8) of the IBC code requires a "written agreement". Financial Debt is defined by the nature of relationship between the creditor and the debtor. In the present case, the debt arises out of sums advanced by the Applicant to the Respondent as interest free unsecured loan. Such a loan amounts to financial debt and the receipt of such a loan implies a promise to repay upon receipt of the loan and upon demand.
- x) The Applicant has relied on the latest audited balance sheet up to 31.03.2016. since the debt has been continuously admitted and acknowledged in the balance sheet up to 31.03.2016, there is no question of it being written off without even a single

communication, prior to or after write off with the Applicant. Further, and without prejudice, the subsequent write off, as alleged, does not extinguish the legal liability of the respondent as the bilateral obligation cannot be extinguished unilaterally. For a liability to be derecognized or for an obligation to be extinguished by means other than payment, it would require the lender to legally waive or forfeit its rights.

- xi) The contents of para 14 and 15 are incorrect and denied. The Respondent has failed to appreciate that the receipt of sums as loan from a party creates a legal obligation to repay immediately and a default occurs if the amount is not repaid despite demand. A written contract is not a necessary pre-requisite to establish relationship of lender and creditor and, in fact, the disbursement of money as loan itself creates such relationship which is governed by the terms implied by law. The balance sheet is both an admission and an acknowledgement of the liability which is approved by the Board and the Statutory Auditors as also the shareholders in AGM and therefore binds the company. The fact of there being a contractual relationship is established by the disbursement of loan, which is clearly provided for in the bank statements and also acknowledged in the balance sheet. In fact, a close look at the balance sheet will reveal that not only is the debt reflected in the balance sheet as received from the Applicant but the funds have also been utilized by the Respondent and there is a corresponding increase in capital work in progress and fixed assets. It is submitted that the reliance on the balance sheet is neither stand-alone nor out of context and the Respondent has not provided any reason to ignore the balance sheet entries that are reflected in accounts spread across 2007-16.



- xii) The contents of para 16 are false to the knowledge of the Applicant and contrary to the record. The balance sheet of the Respondent for F.Y. 2015-16 makes no reference whatsoever to their being no relevant corresponding entry in the books of accounts' for receipt of Rs.62,90,45,905/- from the Applicant Company by the Respondent. Indeed, even the purported Board Resolution of 23.03.2016 filed by the Respondent also reads specifically that the amount is "shown and reflected in the books of accounts of the company as an amount due and payable in the books of accounts". The fact of the respondent writing off some receivables owed to the Respondent has no connection with the writing off of debt payable. Respondent is deliberately seeking to mislead the Hon'ble Tribunal as there is a clear distinction between writing off receivables and writing off liabilities. The accounts of a company may make provisions for certain assets as not recoverable or impaired, for example when banks classify a loan as a bad debt. However, even such a provision made in the balance sheet does not impact the legal right of the bank to recover the bad debt or the obligation of the borrower to repay.
- xiii) The contents of para 17 are wrong and denied except to the extent that the Respondent accept that Rs.62,90,45,905/- is reflected as unsecured loan. It is abundantly clear that the Respondent is falsely stating that the amount is not reflected as claimed by any person. On the contrary, the purported Board Resolution dated 20.06.2017 itself reflects that the amount of Rs.62,90,45,905/- is payable to the Applicant. When the balance sheet of the Respondent is itself acknowledging that the



amount is due and payable, the Applicant has no reason to address any correspondence till such time as it desires the repayment of the amount. In the present case, the latest audited balance sheet for year ending 31.03.2016 signed on 02.09.2016 and uploaded with the RoC on 10.03.2017, reflects the debt and within less than a year of such acknowledgement the Applicant has sought repayment of the loan and immediately upon the refusal to do so has filed the present petition.

- xiv) The contents of para 18, any writing off of the debt does not impact the liability of the company to repay the amount due. The Hon'ble Tribunal may take note of the fact that the letter dated 29.06.2017 written by the Director of the Respondent to the Applicant states that the claims of the Applicant will be "verified from our records". If indeed on 29.06.2017, the Board Resolution dated 23.03.2016, 20.06.2016 and 28-12-2016 had existed, there would have been no reason whatsoever why this fact was not stated either in the letter dated 29.06.2017 or the letter dated 06.07.2017. It would appear that prima facie that aforesaid alleged Board Resolutions are false. However, as stated above, assuming arguendo, that such alleged resolutions were passed, these unilateral actions in no way effect the liability of the Respondent to the Applicant.
- xv) The Applicant denies any internal Board Meeting or reporting by the so-called CFO. It is also relevant to note that the contention in the Reply that there is no record found by the CFO regarding the receipt of loan in the books of Respondent is dishonest and



contrary to admissions made in pleadings in Suit O.S. 1303 of 2013 wherein also the Respondent and its CFO have admitted and acknowledged in the Written Statement to OS 1303 of 2013 that the inter-corporate loan of Rs.62,91,40,790/-.

xvi) The contents of para 21 are denied. The existence of any such opinion is denied. In any event, the existence, or otherwise, of any such legal opinion is of no relevance as the opinion itself has no value in the eyes of law. The opinion has not even been filed on record and, as such, the Applicant is not required to respond to the same. Moreover, the unilateral write-off does not have the legal effect of extinguishing the liability of the Respondent as the Applicant has neither forfeited nor waived its right of recovery.



xvii) It is also an acknowledged and admitted fact that no repayment schedule was agreed for the repayment of the amount to the Applicant. In the absence of any repayment schedule, it is settled law that the loan amount would be payable immediately. If the loan is not repaid upon demand, a default occurs, as in the present case.

xviii) There is no basis to suggest that the loan has been recalled by one director of the applicant unilaterally, or without a Board Resolution. The recall of the loan has been approved vide Board Resolution. The recall of the loan has been approved vide Board Resolution dated 01.06.2017.

xix) The contents of the letters dated 29.06.2017 and 06.07.2017 are denied. It may be noted that neither of the two correspondences make any mention of the write off of any amount of debt and it would, therefore, appear that the so called write off is an after-thought.

- xx) The contents of para 35 are wrong and denied. It is submitted that the amount of Rs.62,90,45,905/- is due and payable as admitted and acknowledged in each balance sheet up to 31.03.2016, being the latest audited balance sheet of the Respondent. There can be no time bar on the recovery of the said amount when the debt is acknowledged year on year by the Respondent in public document being its balance sheet. It is denied that the recovery of the debt is time barred as alleged, or otherwise.
- xxi) The contents of para 36 are wrong and denied. It is submitted that the Respondent is only seeking to mislead the Hon'ble Tribunal by seeking to show that there is a difference in the terminology "inter-company balance" and "inter-corporate loan". In fact the balance sheet of the Applicant and the Respondent both reflect this amount as due and payable under the head loans. Therefore, the allegation of suppression is equally unfounded and baseless. The balance sheet of the Respondent is relied upon as it amounts to conclusive evidence against the Respondent.



25. Financial Creditor submitted that It is a common practice that no written agreement for the loans and the same is valid as per the Indian Contract Act 1872. It is further submitted that under IBC or Indian Contract Act 1872 do not require that contract to be in writing.
26. The Board Resolution dated 20-06-2016/2017 of the Corporate Debtor acknowledged the debt from the Financial Creditor. The Balance Sheet as at 31-03-2013 is dated and signed on 03-09-2013, therefore, according to the Applicant, the limitation period of three years extends up to 03-09-2016.

27. The Petitioner relied upon the following judgements to support his case:

SR. NO.	TITLE / CITATION	RELEVANT PARA
1	Mahabir Cold Storage V. Commissioner of Income Tax, Patna, AIR 1991 SC 1357, 1991 Supp (1) SCC 402 Supreme Court.	Para 12
2	Vijay Kumar Machinery and Electric Stores V. Alaparathi Lakshmi Kanthamma 1968 SCC Online AP 219	Para 40-50
3	S C Gupta V Allied Bev Del. 655 (2009) 163 DLT 495	Para 23,25,31,32,42
4	Culross Opportunities Vs Sharon Bio Medicine Limited, order dt.11.04.2017 of NCLT Mumbai	Para 14
5	Saleem Akbar Ali Nanji Vs. Union of India (2006) 5 SCC 302	Para 17
6	Edelweiss Asset Reconstruction Company Vs. Bharathi Defense and Infrastructure NCLT Mumbai	Para 10-11

28. The Respondent in the present case does not dispute the liability or the amount of debt, but, only argues that due to bar of limitation the debt is not recoverable by the Respondent and has hence been written off by the Respondent.

29. The only argument advanced on behalf of the Respondent is that the debt was last admitted in the balance sheet of the Respondent for the year 31.03.2013 where name of the Applicant is mentioned and therefore the said could have been recovered only till 31.03.2016

30. The date of acknowledgement is the date of signing of the balance sheet by the Board of Directors (see : Vijay Kumar Machinery and Electric Stores v. Alaparathi Lakshmi Kanthamma 1968 SCC Online AP 219, Para 50-TAB 2 of Compilation).



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31. The last audited balance sheet of the Respondent for the year ending 31.03.2016 is signed on 02.09.2016, thus, extending limitation till 02.09.2019.

32. If, in the total amount due to creditors, the debt due to a particular creditor is included, even if said creditor's name is not specifically mentioned, it still amounts to acknowledgement for the purposes of Section 18 of the Limitation Act. The mere non-mention of name is of no relevance. (see: S.C.Gupta v. Allied Beverages Co. Pvt. Ltd. , 2007 SCC Online Del 655, Para 23, 31, 32-TAB-3 of Compilation)

33. The legal position that balance sheet extends limitation has also been accepted and followed under Section 7 of the ICB by coordinate benches of the Hon'ble NCLT in Curloss Opportunities vs. Sharon Bio Medicine Limited (order dated 11.04.2017 of NCLT Mumbai (para 14) – TAB 4 of Compilation.



34. In the present case, therefore, the period of limitation is extended to 02.09.2019 by the balance sheet dated 31.03.2016 signed on 02.09.2016.

35. There is no legal basis for the Respondent to claim that between 20.06.2016, when its own Board Resolution acknowledges the unsecured loan due to the Applicant, and the date of the Petition, the liability of the Respondent to repay the Applicant has vanished. A mere unilateral decision of the Board of the Respondent to so-called write off its own admitted liability, without any basis, does not amount to extinguishing of the liability in law.

36. There is no accounting standard or practice enabling a debtor to unilaterally write off debts owned by it to its creditors. Respondent has not shown any auditing standard in support of such purported write-off. Indian Accounting Standard AS 109 relied upon by the Respondent (para 3.3.1) also does not provide for write off of a subsisting liability.

37.The opinion of the Ld. Senior Advocate relied upon by the Respondent is not relevant. It has not been served upon the Applicant and as such cannot be relied upon by the Respondent. In any event, the opinion cannot be contrary to the settled principles of law and it is for the Hon'ble Tribunal to determine the legality of such write-off. Indeed, if any debtor were able to unilaterally write off the liability then all the NPA's would be written off by the debtors.

38.In any event, the Hon'ble Supreme Court has held that write-off is an internal accounting procedure and does not impact the liability/rights of borrower and lender. In Salim Akbar Ali Nanji Vs Union of India (2006) 5 SCC 302 (TAB-5 of Compilation) has observed.



“the submission proceeds on the basis that the bad-debts written off cannot be recovered. In fact and in law, it is not sothe write off is only an internal accounting procedure to clean up the balance sheet, and it does not affect the right of the creditor to proceed against the borrower to realize his dues”

39.Therefore, the write off is no defense in the eyes of law. Indeed, it is a clear admission that the amount of Rs.62,90,45,905/- is owed to the Applicant as that is why the need to try and write it off even arises.

40.The Respondents own Board of Directors have passed a resolution dated 20.06.2016 admitting that the amount of Rs.62,90,45,905/- is reflected as due and payable to the Applicant in the books of accounts of the Respondent.

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41. It may be noted that the entire defense has no basis whatsoever.

Firstly, the petition in the present case has been authorized both by its Board of Directors and by its shareholders in Extra-ordinary General Meeting by way of resolution dated 01.06.2017 and 04.07.2017 filed with the petition at Page 27. Therefore, since the petition in addition to being authorized by the Board Members is also authorized by the shareholders.

42. Finally, a new argument by way of after thought was sought to be advanced i.e. that the Directors of the Applicant company have not adopted the balance sheets and are hence disqualified. There is no pleading in support of this defense, and hence ought not to be considered as if such a defense had been taken in pleading, the applicant have already been adopted and filed for period ending 31.03.2016 with the Hon'ble High Court of Hyderabad along with above mentioned Writ Petition No.22997 of 2017 that was filed on 11.07.2017



43. Indeed, the defense also has no legs to stand on as the present petition is also directly authorized by share holders in EGM on 04.07.2017. Moreover, the provisions of Section 164(2) of the Companies Act, 2013 relied upon by the Applicant came into force only on 01.04.2014 and under Companies Act, 1956 there was no such provision applicable to private limited companies. The penal disqualification is prospective in nature and hence the period for disqualification will begin only after expiry of time for filing balance sheet for year ended 31.03.2017 which is upto 30.09.2017. Therefore, it would be incorrect to say that the directors are disqualified. In any case, this question need not be decided in the present petition, as the institution of the petition is also authorized by the share holder by way of EGM Resolution dated 04.07.2017.

44. For maintainability of the Petitioner under Section 7 (5) (a) of the IBC for admission of the petition is that a default should have occurred, the petition should be complete, and there should be no disciplinary proceedings pending against the IBC. Therefore, the status of the audited accounts of the financial creditor is not a relevant factor, (even though in present case the audited accounts have in fact been adopted by the Applicant).

45. The decision sought to be relied upon by the Respondent Nikhil Mehta v. AMR judgement of the NCLAT dated 21.07.2017 has no bearing on the present issue as that was a case of assured return on a property purchase where the NCLAT found that there is a financial debt and admitted the petition. The requirement for financial creditor as explained by the NCLAT in Nikhil Mehta case is also the very same:

- i) A person to whom a "Financial Debt" is owed and includes a person whom such debt has been legally assigned or transferred to
- ii) The debt along with interest, if any, is disbursed against the consideration for time value of money and include any one or more mode of disbursed as mentioned in clause (a) to (i) of sub section (8) of Section 5. (emphasis supplied)

46. In the present case the inter-corporate loan falls under Section 5(8) (f) of the IBC and there can be absolutely no doubt that the debt is a financial debt. The unsecured loan in the present case is reported as borrowing in the balance sheet of the Respondent. It is reported under the head "unsecured loans" and therefore has to be included as Financial Debt.



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47.The essence of the IBC is the expeditious resolution of the insolvency and not to merely be tied down by technicalities. A pertinent observation has been made in Edelweiss Asset Reconstruction Company v. Bharati Defence and Infrastructure, NCLT Mumbai judgement dated 06.06.2017.

OUR OBSERVATIONS:

48.According to our view though the proceedings under IBC is a summary proceeding however, in the instant case, the respondent raised various preliminary objections as stated supra. Considering the nature of issues raised, we thought it fit to discuss the same before admitting/rejecting the Company Petition No.97/7/HDB/2017.



49.(a) We have considered the reply of the Petitioner and satisfied with the submissions i.e. the Petitioner's name is not struck off from the Register of Companies and no official gazette publication was issued as contemplated under Section 248(5) of the Companies Act, 2013.

(b) Further, in the interest of the case, we would like to reproduce the important portion of the order of Hon'ble High Court

"having the regard to the above, there shall be interim direction to the Respondents not to proceed of the Gazette Publication as contemplated under Section 248(5) of the Act, in relation the Petitioner company"

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(c) Also the Learned Senior Advocate for the Corporate Debtor during the hearing held on 01-08-2017 has confirmed that the name of Financial Creditor was not published in the official Gazette (regarding struck off of the name of the Financial Creditor) as per Section 248 (5) of the Companies Act, 2013.

50. We have also taken into account the submissions of Financial Creditor with regard to disqualifications of Directors and authorization given by shareholders by way of Resolution in EGM held on 04.07.2017.

51. The Financial Creditor submitted that share issue and share transfer are subject matter of the Civil Suits in O.S.No.21 of 2012 and O.S.No.1303 of 2013 pending before the Learned District Judge, Ranga Reddy Court, Hyderabad and not relating to repayment of the loan. Therefore, the prayer of Corporate Debtor is not considered.

52. Further, while perusing the Government approval for foreign collaboration conveyed vide its letter dated 9-4-2007, the letter was addressed to Quinn Logistics Sweden, and not to the Financial Creditor i.e. Quinn Logistics India Pvt. Ltd., With regard to the contentions of the Corporate Debtor regarding applicability of FEMA, we are satisfied with the submission of the Financial Creditor.

Issues relating to Inter-corporate Loan by Financial Creditor:

53. The Financial Creditor namely Quinn Logistics India Pvt. Ltd. extended Inter Corporate Loan to Mack Soft Tech Pvt. Ltd. The total outstanding amount has been duly acknowledged in the



Balance Sheet of Respondent/Corporate Debtor for the year ending 31-12-2007 was Rs.74,27,80,702/-. After further repayments/adjustments the total outstanding increased to an amount of Rs.74,78,67,942/- as on 31-12-2008, and the same was duly acknowledged in the Balance Sheet as on 31-12-2008. Subsequently, the outstanding loan amount came down to Rs.62,90,45,905/- and the same was also duly acknowledged in the Balance Sheet for the year ending 31-03-2013.

54. Financial Creditor has submitted bank statements as proof of disbursement of loans to the Corporate Debtor and we are satisfied with the same.



55. From the Balance Sheet of the Corporate Debtor, it is noted that under the Head long term Borrowings–Secured, the name of the Bank i.e. HDFC Bank Ltd is mentioned along with the amount in note No.5. The same note under the head unsecured loans from overseas investor, bodies corporates, names of the lenders are not mentioned but only amounts are mentioned in the Balance Sheets as at 31-03-2014, 31-03-2015, 31-03-2016. Whereas the Balance Sheet as at 31-03-2013 in Note No.3 under the heading unsecured loans from bodies corporate, the lenders name viz Quinn Logistics India Pvt. Ltd. and Quinn Properties India Pvt. Ltd. were mentioned along with total amount of Rs.62,94,18,213/- and all these Balance Sheets are audited by the same Auditor namely M/s. Sarath & Associates, Chartered Accountants.

56. Para 3 b&c of the Independent Auditors' Report to the Members of Mack Soft Tech Pvt. Ltd. for the year ended 31-03-2012 stated as follows:

- b) "As per the information and explanation given to us, the company has taken unsecured loans from two parties covered in the register maintained under Section 301 of the Act. The amount of loan outstanding at the year and maximum amount of loan involved during the year is Rs.62,94,18,214/-"
- c) "The above loans do not stipulate any specific repayment schedule."

57. In the independent auditors' report for the year ended 31-03-2013, also had comments mentioned at point (b) above, however, in the subsequent auditors report the same was not mentioned.

58. With regard to the contention/submission of the Respondent, the amount disbursed to Corporate Debtor is not part of the balance sheet of Financial Creditor, while perusing the records submitted by the Corporate Debtor itself, we have observed / found the Audited Reports for year ending 31-12-2009 of Quinn Logistics India Pvt. Ltd (Financial Creditor) under the heading current assets / loans and advances, an amount of Rs.63,15,88,023/- was shown as loans and advances and also previous year ending 31-12-2008, an amount of Rs.74,80,26,336/- was also shown as loans and advances. While further analyzing the schedules of balance sheet, the same was discussed in Schedule-8 and said amount was against the name of Mack Soft Tech Pvt. Ltd. i.e. the Corporate Debtor, therefore, even in this count also the Corporate Debtor have failed and in addition to the balance sheet, the Financial Creditor have also submitted the bank statement, establishing the proof of loans disbursement to Corporate Debtor.



59. The Financial Creditor recalled vide letter dt.15-06-2017 the Inter Corporate Loan and called upon the Corporate Debtor to repay the outstanding loan amount of Rs.62,90,45,905/- on or before 30-06-2017. In response to the same, the Corporate Debtor replied to the recall letter vide letter dt.29-06-2017 (and the same was received by the Financial Creditor on 03-07-2017) stating that it has to verify the claims made by the Financial Creditor from its records and sought two to three weeks' time for the same. However, the Corporate Debtor failed to repay the loan amount to the Financial Creditor and hence default has occurred.

60. Even though Financial Creditor did not call for repayment of the debt in the past, it is a paramount duty cast upon on the Corporate Debtor to repay the debt. If we agree this argument then lenders will be put to highly disadvantageous position. For the contention of the Corporate Debtor that the money was paid to M/s.Indu Projects Ltd & other liabilities on behalf of the Corporate Debtor in 2007 to 2010, the Financial Creditor has prayed that It is like loan disbursed by the bank towards the housing loan granted to any individual wherein the bank pays directly to the builder rather than making payment to the borrower. Therefore, we are satisfied with the reply of the Financial Creditor

61. The Bench has carefully examined all the records, documents submitted by the Financial Creditor and satisfied that the Corporate Debtor has failed to repay an amount of Rs.62,90,45,905/- and established a default on the part of the Corporate Debtor. Though there was no written agreement between the Financial Creditor viz Quinn Logistics India Pvt. Ltd.



with the Corporate Debtor viz Mack Soft Tech Pvt. Ltd, the Balance Sheets of the Corporate Debtor, itself shows the outstanding amount in the name of the Financial Creditor in the Balance Sheets of upto the Financial Year 2012-13. In the subsequent Balance Sheet, the name of the Financial Creditor was not mentioned, however the same outstanding amount of Rs.62,90,45,905/- was reflected in the subsequent Balance Sheets under the heading unsecured loans in note No.5-Inter Corporate Loans.

62. The Corporate Debtor was enjoying Inter Corporate Loan granted by the Financial Creditor as interest free loan for quite a number of years and they should be happy with the same. It is also unique to observe that the borrower after enjoying the interest free loan for so many years instead of repaying the debt, taken various pleas as discussed supra. The Financial Creditor was a holding company of the Corporate Debtor in the beginning and during the course of period the loans were disbursed free of interest. Section 5(8) of IBC Code also states that the Financial debt means a debt along with interest if any.

Issues relating to writing off / limitation:

63. We agree with the submission of the petitioner regarding the limitation period which extends up to 03-09-2016. We would also like to add that the shareholders approved/adopted the balance sheet in the Annual General Meeting held on 30-09-2013. It is also interesting to note that the said Balance Sheet as at 31-03-2013 of the Corporate Debtor was filed with ROC only on 24-12-2015.

64. From the various Board Minutes, it is noted that the Board of Corporate Debtor has taken steps since 23-6-2016 to write off the loan amount of the Financial Creditor and finally based on the expert legal opinion, the Board of Corporate Debtor decided to



write off the outstanding amount of Financial Creditor with immediate effect. Though the entire exercise took nine months to write off, at none of the points, the Financial Creditor was ever given an opportunity to explain its stand with regard to writing off its own outstanding amount. Therefore, we are of the considered view that the Corporate Debtor has not complied with the Principles of Natural Justice and the entire events show the aim / goals of the Corporate Debtor.

65. It is also quite interesting to observe that based on the legal opinion dated 22-11-2016 obtained by the Corporate Debtor a huge amount of Rs.62,90,45,905/- was written off and was treated as deemed income in the books of the Corporate Debtor for the Financial Year ending 31-03-2017. Even further it is quite interesting to observe that to write off such a huge amount of Rs.62,90,45,905/-, no opportunity was ever provided to the Financial Creditor in total disregard to complying with the Principles of Natural Justice. The Corporate Debtor had written off the amount unilaterally.

66. We are of the opinion that anyone can write off debts due to it but not due to others i.e. anyone can write off its receivables but not its liabilities without the consent of other parties.

67. Even as the extreme step, if, Corporate Debtor is permitted to write off the debt owed to third party/Financial Creditor, the amount may have been credited in the account of the Government especially to the fund of Investor Education and Protection Fund but not in the Balance Sheet of the Corporate Debtor.



68. Though the board already decided to write off the amount due to the Financial Creditor in the Board Meeting held on 28-12-2016, we failed to understand why the reply to the Financial Creditor vide letter dated 29-06-2017 sought further time to verify the records and clarify (6 months).
69. The Bench is of prima facie view that writing off of the huge amount of Rs.62.94 cores, considering the same as income in the hands of the Corporate Debtor would be to give a healthy / better Financial results (Profit & Loss Account / Balance Sheet).
70. It is worth to mention that profit / loss for the period up to 31-03-2015 was Rs.2,58,01,926/- whereas for the period 31-03-2016 was only Rs.32,354/- and Reserves & Surplus for the period as on 31-03-2015, was negative balance of Rs.38,21,56,388 and as at 31-03-2016 was negative balance of Rs.34,10,08,087/-. The Corporate Debtor has not submitted the Balance Sheet as on 31-03-2017 either audited / un-audit. As per the information furnished, the basic earnings per equity shares (EPS) before extraordinary items for the year ending 31-03-2015 was Rs.105.72 and for the year 31-03-2016 was Rs.0.13.
71. The stand of the Corporate Debtor that the recovery is time barred and therefore, the amount is not due or payable as per law, the same appears to be incorrect. The lender will have a right to recover its money and equally the borrower is under obligation to repay the loan. If we accept the stand of the borrower then borrower becomes King and the lender is put to disadvantageous position which should not be a normal commercial practice. Borrower/Lender should fulfill their individual obligations so as to ensure the Corporates function well which in turn will help the economy.



72. The Corporate Debtor's stand that intercompany balance is not a debt or claim, however, we agree with the submissions of the petitioner and we are also of the view that both are one and the same and having the same effect.

73. We are of the prima facie view the Accounting Standard relied upon by Corporate Debtor is not related to the current facts & circumstances of the case since the accounting standard states that "when the obligation specified in the contract is discharged or cancelled or expires.

74. Apparently, in the instant case there are no obligations specified, more over the petitioner itself accepted that there is no written agreement between the petitioner and Corporate Debtor. Further, the term "Expires" stated in the aforesaid accounting standard, there is no corresponding provision stating that the same is governed by Limitation Act, 1963. Therefore, even this contention of the respondent does not help them.

75. From the entire records, contentions of the Corporate Debtor who pointed out various preliminary objections on the part of the Financial Creditor viz:

- 1) Name of the Applicant has been struck off from the ROC, the Applicant does not exist as a company and or legal entity,
- 2) Petitioner is not a Financial Creditor,
- 3) Claim is time barred, etc.

It appears that instead of taking defense with regard to the Financial Debt, repayment of the Financial Debt, the Respondent spent sufficient energy on the other preliminary issues.



76. There is no demand from the Financial Creditor to repay the debt during the three years period. According to us, it is quite strange that borrower instead of repaying the borrowed money/debt discussed in detail, the functioning of the Financial Creditor such as the Financial Creditor did not file its Annual Reports/Balance Sheets with ROC, did not conduct Annual General Meetings for years etc. We are of the considered view that the borrower cannot take all these pleas, and escape from non-fulfilment of its liability, non-payment of its debt.

77. However, the Bench is of the prima facie view that to avoid disputes like in this case it would be advisable/beneficial/for audit trials for all to enter into an agreement with detailed terms & conditions including the schedule of the repayments, interest charged etc. However, in the present case, the Financial Creditor and Corporate Debtor had Holding/Subsidiary Company relationship and the Financial Creditor also submitted the bank statements towards disbursement of loan/money to Corporate Debtor and in balance sheet for the year ending 31.12.2009.

78. The Hon'ble NCLAT in the matter of Innoventive Industries Ltd decided on 15-05-2017 held that for initiation of Corporate Insolvency Resolution Process by Financial Creditor under sub Section 4 of the Section 7 of the Code. The adjudicating authority on receipt of application under sub Section(2) is required to ascertain existence of default from the records of information



utility or on the basis other evidence furnished by the Financial Creditor and the sub sec (3). Under sub Section 5 of sec 7, the adjudicating authority is required to satisfy-

- a. whether a default has occurred,
- b. whether an application is complete; and
- c. whether any disciplinary proceeding is against the proposed insolvency resolution professional.

Once Itsatisfied, it is required to admit the case

In the instant case, we are of the considered view that Financial Creditor has fulfilled all the three essential criteria's mentioned above therefore, we have no hesitation in admitting the case / application under IBC 2016.

79. After careful examination of all the records and contents of the Corporate Debtor, we are satisfied that the Corporate Debtor owes Rs.62,90,45,905/- therefore, debt and default has been established by the Financial Creditor and accordingly the CP (IB) No. 97 / 2017 as prayed by the Financial Creditor is admitted.

80. In view of the above facts and circumstances, records produced, expert legal opinion, judgements submitted by both the parties, we are satisfied that Financial Creditor has to receive Rs.62,90,45,905/- which is the debt & default amount. Therefore, there is a default by the Corporate Debtor and we are satisfied that the Financial Creditor is entitled to claim relief under section 7 of the IBC, 2016. Therefore, we admit the present company petition/application filed under IBC with following directions:

- a. We declare a moratorium by prohibiting the following actions:
 1. The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;



2. Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 3. Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
 4. The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
 5. The supply of essential goods or services to the Corporate Debtor if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- b. Direct to cause the public announcement of initiation of Corporate Insolvency Resolution Process of the Company as per the details given in section 15(1) and 15(2) on www.ibbi.gov.in (designated website of Insolvency and Bankruptcy Board of India, circulated vide IIBI/IP/PUBLIC ANN/221, dated 01.02.2017) in addition to other accepted modes of publication, immediately and call for submission of claims as per section 15 of the IBC, 2016 read with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The publication shall also be made in the website of the Corporate Debtor.
- c. We appoint Mr.Sundaresh Bhatt, (Regn. No.IBBI/IPA-001/ IP-P00077/2017,18-10162) as an Interim Resolution Professional.
- d. Direct the personnel of Mack Soft Tech Pvt. Ltd. to assist and cooperate with Interim Resolution Professional to provide access to documents and records and management of the affairs of the company.



- e. We direct the Interim Resolution Professional to constitute a committee of Creditors, after collation of all claims received against the Corporate Debtor and determination of Financial position of Corporate Debtor as per section 21 of IBC. The first meeting of the committee of Creditors, shall be held within 7 days of the constitution of committee of Creditors and their decision has to be communicated to the Tribunal as per section 22 of IBC, 2016.
- f. We direct the Interim Resolution Professional to follow all the applicable provisions of the Insolvency and Bankruptcy Code 2016 and Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016.
- g. The IRP shall perform all these functions religiously and strictly which are contemplated, inter alia, by sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices available in the discipline of insolvency.
- h. It is further made clear that all the personnel connected with a Corporate Debtor its promoters or any other person associated with the management of the Corporate Debtor are under legal obligation under section 19 of the code to extend every assistance and cooperation to the IRP as may be required by him in managing the affairs of the Corporate Debtor. We specifically direct the IRP to protect and reserve the value of the property of the Corporate Debtor as a part of his obligation imposed under Section 20 of the code and perform all his functions strictly in accordance of the provisions of the code.



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- i. We also direct the Financial Creditor to file appropriate compounding applications before the Registrar of Companies, Hyderabad for various non-compliances/delayed compliances with regard to various provisions of the Companies Act as contended by the Respondents within two weeks from the date of receipt of copy of this order and report compliance to the Registry of NCLT, Hyderabad.

Post the case on 15-09-2017.



Sd/-
RAVI KUMAR DURAISAMY
MEMBER (TECHNICAL)

Sd/-
RAJESHWARA RAO VITTANALA
MEMBER (JUDICIAL)

Order received by true Registry on 21/8/17
प्रमाणित प्रति

CERTIFIED TRUE COPY

केस संख्या
CASE NUMBER: C.P.(I.B.) No. 97/2/HDB/2017
निर्णय का तारीख
DATE OF JUDGEMENT: 11-8-2017
प्रति तैयार किया गया तारीख
COPY MADE READY ON: 21-8-2017

V. Annapoorna
V. ANNAPOORNA
Asst. DIRECTOR
NCLT, HYDERABAD.

CERTIFIED TO BE TRUE COPY
OF THE ORIGINAL